

EXHIBIT 1

1
2 UNITED STATES DISTRICT COURT
3 SOUTHERN DISTRICT OF NEW YORK
4 11-CV-5454 (GBD)

5 - - - - -x

6 JOHN WILEY & SONS, INC., :

:

7 Plaintiff, :

:

8 - against - :

:

9 DRK PHOTO, :

:

10 Defendant. :

:

11 - - - - -x

12 321 W. 44th Street
13 New York, New York
14 June 6, 2013
15 10:00 a.m.

16
17
18
19
20 DEPOSITION OF JAMES H. PICKERELL, held
21 at the above-mentioned time and place, before
22 Randi Friedman, a Registered Professional
23 Reporter and Notary Public within and for the
24 State of New York.
25

1 J. Pickerell

2 Q. Do you know Dan Krasemann?

3 A. No. Know of him, but I've never met
4 him.

5 Q. What do you know of him?

6 A. I know he is stock agent. I don't
7 remember if he's still a member of PACA. He at
8 one point was. I've heard many people talk about
9 him over the years, but I've never met him.

10 Q. What do you know about him?

11 A. Not a whole lot, other than he seemed
12 to have a good reputation from all the
13 photographers that I've talked to who mentioned
14 his name.

15 Q. Have you spoken to him in the context
16 of doing your report in this case?

17 A. No.

18 Q. Have you ever spoken to him?

19 A. No.

20 Q. Have you ever corresponded with him?

21 A. Not that I can recall.

22 Q. Have you ever published anything about
23 him?

24 A. Not that I can recall, but I've
25 published a lot of articles over the past couple

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2 are referring to?

3 A. Well, the other aspects are if the
4 license does not specifically say, allow
5 electronic use, and they discover that there has
6 been electronic use, that's another aspect. If
7 the publisher -- if they -- if the license does
8 not specifically allow print in another language,
9 that's another aspect. If the license does not
10 allow use outside of the United States, outside
11 of North America, that's another aspect.

12 Q. So sellers aren't forced to rely on
13 the publishers to find out about that because
14 they can find out if it's been offered in
15 electronic form or offered in another edition or
16 offered outside the United States by checking
17 Amazon; correct?

18 MR. HARMON: Objection to form.

19 THE WITNESS: They could
20 constantly check Amazon. It would be very
21 difficult for them to check and determine
22 whether it's been used outside the United
23 States. It would be difficult for them to
24 check -- to determine whether it's been in
25 another language. They might be able to

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2 determine that in Amazon.

3 Since most of the electronic uses
4 are on password-protected sites, it would
5 be, I would think, almost impossible for
6 them to determine whether it has been used
7 on an electronic site, because they wouldn't
8 have -- they couldn't search for that and
9 find it and have that aspect.

10 So there are some ways that they
11 can determine whether there have been other
12 uses, but certainly not all of the other
13 uses.

14 (Exhibit Pickerell-9 was marked.)

15 Q. Would you please take a look at the
16 document that's been marked Exhibit 9 and tell me
17 if Exhibit 9 is familiar to you.

18 A. It is certainly from my newsletter,
19 and it was published in 1999.

20 Q. And is the document or the article
21 that is Exhibit 9 something that was written by
22 you?

23 A. Yes.

24 Q. If you turn to the last page of
25 Exhibit 9, you see the heading, What To Do?

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2 still be a fair term in that area. I can't be
3 more specific than that as to what would be fair.

4 Q. Using the method of determining your
5 view of fees that were reported in your
6 submissions and the other cases we've discussed,
7 what would be the appropriate fee in a
8 circumstance where the pricing agreement gives a
9 price for a press run of up to 40,000; the
10 permission, notwithstanding the 40,000 in the
11 agreement says you have the rights to print up to
12 20,000 copies; and instead 30,000 copies are
13 printed? How do you apply your pricing
14 methodology to that?

15 A. Well, in my book, I believe I --
16 certainly by 2001, I had a price for a print run
17 of 20,000.

18 Q. But just to be clear, in this
19 circumstance if we're dealing with let's say
20 Wiley's price agreement that doesn't have a price
21 below 40. It's up to 40. They have an
22 authorization to print 20, and they print 30.

23 So what -- how do you determine the
24 price in that circumstance?

25 MR. HARMON: I object to the

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2 interruption. I just want Mr. Pickerell to
3 be able to finish the response he was making
4 before you interrupted him. Then if you
5 want to follow up with that question. Can
6 you kindly -- my objection is you should be
7 able -- you should be permitted to finish
8 your answer before another question is
9 posed.

10 THE WITNESS: I need to figure out
11 where I was.

12 (Whereupon the reporter read back
13 the requested portion of the record.)

14 THE WITNESS: What I was trying to
15 say is that the price for 20,000 wasn't half
16 of the 40,000 price. It was -- and I don't
17 remember exactly, but let's say the price
18 for 40,000 was \$200.00; and the price for
19 20,000 was 170 or something like that.

20 And so then if they had
21 licensed -- if they had licensed for 40,000,
22 printed 20, and then printed another 20,
23 they're still within the 40,000. If they
24 licensed for 20 and then printed 40, then
25 we've got -- we've gone to the two to three

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2 times, because this is an overrun of what
3 they licensed.

4 BY MR. PENCHINA:

5 Q. That was under your book or under the
6 pricing agreement?

7 A. In that case, the pricing agreement --
8 the fact that if they had a 20,000 fee in the
9 pricing agreement, and that's the thing that they
10 licensed, then that's the usage that is allowed.
11 The fact that they have 40,000 also in the
12 pricing agreement is irrelevant because it's what
13 they licensed for. It's not the other terms that
14 are in the pricing agreement that weren't part of
15 the license.

16 Q. But if there's no price for 20,000, so
17 that the pricing agreement says \$170.00 for up to
18 40,000 --

19 A. Right.

20 Q. -- and the invoice says you're limited
21 to 20,000 copies, and instead the publisher
22 prints 30,000 copies, they're still under what
23 the initial price for up to 40 was. How would
24 you price it?

25 A. I would still say that that's an

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2 overrun, because basically even though the
3 pricing agreement is set up as this is what we
4 would charge for X amount of uses, the publisher
5 comes to him and says, okay, in this case, we
6 only want to print 20,000. So he gives the
7 license just for 20,000. And that's what the
8 license says. It's not some mysterious thing
9 that's related to the pricing agreement. That's
10 what the license is.

11 And then if they overrun the license,
12 even though the price was -- he charged the same
13 for 20,000 as he would have charged for 40,000,
14 even though that's in the license. Now they
15 could have asked for 40,000 in the first place
16 and probably should have. That's their mistake.
17 Not the seller's mistake. But he should not --
18 when they overrun the license, that is the
19 critical issue. And that's where we go into the
20 charging additional fees.

21 Q. So what would the additional fee be?

22 A. Two to three times.

23 Q. Two to three times?

24 A. Two to three times that price for the
25 first thing. Then we get back a little bit to

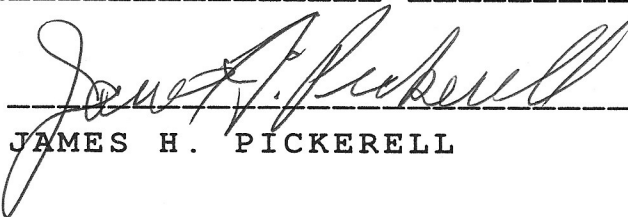
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 VERITEXT REPORTING COMPANY
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CASE: JOHN WILEY & SONS VS. DRK PHOTO

DEPOSITION DATE: JUNE 6, 2013

DEPONENT: JAMES H. PICKERELL

PAGE	LINE(S)	CHANGE	REASON
54	11	REMOVE "they were paying"	Rest of sentence explains my thought.
54	16	"through" to "to"	case Supreme Court refused to review the case
55	19	REMOVE "supply the"	Rest of sentence makes sense
133	16	change "money" to "use"	talking about image use, not money
137	23	REPLACE "are" with "were"	wrong tense


 JAMES H. PICKERELL

SUBSCRIBED AND SWORN TO BEFORE ME

THIS 01 DAY OF July, 2013.


 ANDREW RESNICK

NOTARY PUBLIC

(NOTARY MONTGOMERY COUNTY
 MARYLAND)

3/22/2017

MY COMMISSION EXPIRES:

MY COMMISSION EXPIRES 3/22/2017

VERITEXT REPORTING COMPANY